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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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No. 98

ISIAH RELFORD,

Petitioner,

v.

COMMANDANT, U.S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 35 through 37)[1] is reported at 409 F.2d 824. The Memorandum and Order of the United States District Court for the District of Kansas (R. 30 through 32) is unreported.

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[1] Reference is to the single Appendix filed in this Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 23, 1969 (R. 38). The petition for a writ of certiorari and motion for leave to proceed in forma pauperis were filed on July 22, 1969 and granted by Order of this Court dated February 27, 1970 (R. 39). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. I, Sec. 8, cl. 14:

> The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces;

United States Constitution, Art. III, Sec. 2:

> . . . The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

10 U.S.C. § 802(1) (Art. 2, Uniform Code of Military Justice):

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

10 U.S.C. § 920 (Art. 120, Uniform Code of Military Justice):

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

10 U.S.C. § 934 (Art. 134, Uniform Code of Military Justice):

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good

order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

This Court granted certiorari limited to questions of the scope and retroactivity of its decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969) (R. 39). Consequently, the questions presented are:

(1) Do the facts of this case fall within this Court's holding in *O'Callahan v. Parker, supra*, that a court-martial, held under the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, has no jurisdiction to try a member of the armed forces for the commission of a nonservice-connected crime?

(2) Should the rule of *O'Callahan v. Parker, supra*, be given full retroactive effect so as to apply to court-martial convictions that are final on the date of the *O'Callahan* decision?

STATEMENT OF THE CASE

Petitioner, while a corporal in the United States Army and stationed at Fort Dix, New Jersey, was arrested and charged by the Army with the kidnapping (10 U.S.C. § 934) and rape (10 U.S.C. § 920) of two different women on September 4, 1961 and October 21, 1961, respectively (R. 18 and 19). On December 18, 1961 petitioner was tried by general court-martial and on December 19, 1961 he was found guilty of all charges and sentenced to be reduced to the lowest enlisted grade, to forfeit all pay and allowances and to be put to death (R. 17 and 19).

The prosecution produced testimony that both rapes occurred in remote areas of Fort Dix (R. 5, 11, 15 and 16), that the September 4 kidnapping took place in the Walson Army Hospital parking lot (R. 4 and 16) and that the October 21 kidnapping took place at McGuire Air Force Base (R. 8 and 14). Other testimony established that at the time the alleged crimes were committed petitioner was on evening pass (R. 13) and dressed in civilian clothes (R. 5 and 13). The victim of the September 4 kidnap and rape was a civilian who lived some 60 miles from Fort Dix and happened to be visiting Walson Army Hospital with her brother (R. 3 and 4). The victim of the October 21 kidnap and rape was a civilian living at McGuire Air Force Base with her husband, a serviceman (R. 6).

The Army Board of Review found the findings of guilty correct on June 11, 1963, but further determined that only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for thirty years and reduction to the grade of E-1 should be approved (R. 21 through 26). On September 24, 1963 the United States Court of Military Appeals declined review (R. 27).[2]

On October 23, 1967, petitioner, *pro se,* filed a petition for writ of habeas corpus in the United States District Court for the District of Kansas. This petition is now before this Court. On June 19, 1968 the District Court denied the writ concluding *inter alia* that the general court-martial had jurisdiction over the person of the petitioner and the offenses of which he was convicted (R. 30 through 32). Petitioner appealed and the United States Court of Appeals for the Tenth Circuit affirmed on April 23, 1969 (R. 38).

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[2]Petitioner is currently on parole from his military sentence.

SUMMARY OF ARGUMENT

O'Callahan v. Parker, 395 U.S. 258 (1969), holds that military tribunals have no jurisdiction to try servicemen for the commission of peacetime crimes within the United States unless those crimes are "service-connected." Upon analysis of this Court's decision in *O'Callahan*, it is clear that the requirement of service-connection demands that the crime charged be military in nature before military jurisdiction can attach.

A "military" crime is one involving a level of conduct required only of servicemen and, because of the special needs of the military, demanding military disciplinary action. Petitioner's alleged crimes, as O'Callahan's, are not military in nature. They do not involve a level of conduct required only of servicemen. Furthermore, the military has no greater need to try petitioner's alleged crimes than it had to try O'Callahan's crimes. Within the context of the clear meaning of "service-connection," neither the fact that petitioner's alleged crimes took place on a military reservation nor the fact that one of the victims was a military dependent adds significant weight to an argument that the military has a special need in trying petitioner that it lacked in the *O'Callahan* case.

The purpose of the *O'Callahan* rule is to correct an abuse that affects the very integrity of the fact-finding process by which petitioner was convicted. The defect in petitioner's conviction goes to the very center of its legal justification, the power of the military court to act. In these circumstances, this Court has always held that decisions should be given retroactive effect. The fact that the authority of the military to try all crimes by servicemen had not been questioned before *O'Callahan* and that the consequent burden on the administration of justice may be substantial will not justify a prospective application of *O'Callahan*.

ARGUMENT

I. THE FACTS OF THIS CASE FALL WITHIN THE SCOPE OF THIS COURT'S HOLDING IN O'CALLAHAN v. PARKER.

A. Under O'Callahan v. Parker peacetime military jurisdiction over crimes committed within the United States is limited to those crimes involving a level of conduct required only of servicemen, violation of which creates an immediate need for military disciplinary action.

O'Callahan v. Parker, 395 U.S. 258 (1969), involved an inquiry into the extent of the power granted Congress by Article I, Section 8, clause 14 of the Constitution to vest courts-martial with jurisdiction over crimes committed by servicemen in peacetime within the United States. This specific inquiry had never before *O'Callahan* been presented to this Court, although the Court has often in analogous situations warned against extension of the very limited and extraordinary jurisdiction of military tribunals. See, *e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Enforcing a citizen of the United States' right to indictment by grand jury, guaranteed by the Fifth Amendment, and his right to trial by jury in a civilian court, guaranteed by Article III, Section 2 of the Constitution and the Sixth Amendment, this Court held that military tribunals have no jurisdiction over crimes committed by servicemen in peacetime within the United States unless those crimes are "service-connected." 395 U.S. at 272.

The phrase "service-connected" takes on explicit, identifiable meaning when viewed within the context of the factors considered by this Court in arriving at the conclusion that the crime must be so connected.

First, it was recognized that, "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mech-

anism by which military discipline is preserved." 395 U.S. at 265."

See also *Reid v. Covert*, 354 U.S. 1 (1957). In short, military courts are of necessity not impartial weighers of justice, but must have as their primary consideration the enforcement of the unique discipline required of a fighting force.

Secondly, while it was recognized that a system of specialized military courts in which all the constitutional safeguards normally afforded citizens of the United States are not provided may be necessary to protect the effectiveness of our fighting forces, "the justification for such a system rests solely on the special needs of the military." 395 U.S. at 265. Consequently, this Court recognized that the jurisdiction of courts-martial must be limited to the "least possible power adequate to the end proposed." 395 U.S. at 165 (quoting from *Toth v. Quarles, supra*).

Finally, it is implicit in this Court's decision that all citizens, regardless of their military status, are entitled to the fundamental rights of indictment by grand jury and trial by jury in a civilian court guaranteed them by the Constitution unless they are in fact members of the armed forces *and* unless the crimes of which they are accused have an immediate adverse effect upon the ability of the military to perform its mission. Citizens of the United States do not automatically shed their citizenship upon entry into the armed forces. See *Burns v. Wilson*, 346 U.S. 137 (1953). In light of the essential nature of military courts, the limited nature of their jurisdiction and the continued citizenship of our servicemen, the phrase "service-connected" requires that the *nature* of the crime charged must involve a level of conduct required only of servicemen, violation of which creates an immediate need for military disciplinary action.

B. The crimes for which petitioner was convicted were not "service-connected" within the meaning of O'Callahan v. Parker.

O'Callahan, a sergeant in the Army, stationed in Hawaii, was charged with and convicted by a general court-martial of the crimes of attempted rape, assault with intent to commit rape and house-breaking with intent to commit rape. The crimes took place off-post, while O'Callahan was on evening pass and dressed in civilian clothes. The victim was a civilian having no connection to the military. The offenses charged were cognizable in the civilian courts and were committed in peacetime within the territorial limits of the United States while the civilian courts were open and functioning. Finding not the remotest connection between O'Callahan's crimes and the special needs of the military, this Court held that the crimes were not service-connected and that O'Callahan "could not be tried by court-martial but rather was entitled to trial by the civilian courts." *O'Callahan v. Parker, supra,* at 274.

The relevant factual differences between the instant case and *O'Callahan* are: (1) the crimes charged differ; (2) petitioner's crimes are alleged to have occurred on military reservations (R. 5, 11, 14, 15 and 16); and (3) one of the alleged victims was the wife of a serviceman (R. 6). These *apparent* distinctions evaporate when viewed within the context of the "service-connected" test provided by the *O'Callahan* decision.

The level of conduct petitioner is alleged to have violated by his alleged crimes (*i.e.*, sexual intercourse only with consent (see, 10 U.S.C. § 920)) is certainly a level of conduct required to the same degree in the civilian as the military community. The required level of conduct is neither altered by geographical considerations nor by the fortuity of military dependency. In short, the crimes of which petitioner was charged are no more "military crimes" than the crimes involved in *O'Callahan*.

Moreover, there is no greater or more immediate need for military disciplinary action in the instant case than there was in *O'Callahan*. The military dependence of one of petitioner's alleged victims does not present any immediate adverse impact upon the ability of the military to perform its mission not also presented by the facts of *O'Callahan*. The United States Court of Military Appeals has held that this status of the victim does not suffice under the service-connected test. *United States v. Henderson*, 18 U.S.C.M.A. ___, 40 C.M.R. ___ (1969). It is submitted that an analysis of that holding in the context of an inquiry as to the immediate impact upon the mission of the military compels adoption by this Court of the conclusion reached by the Court of Military Appeals.

In light of the foregoing, it appears certain that had petitioner's crimes occurred off-post, the military would have no jurisdiction under the *O'Callahan* rationale. Yet, the impact on the ability of the military to perform its mission remains the same whether the crimes of which petitioner was charged are committed on or off the military reservation. If the on-post locational factor in the instant case adds a military interest not present in *O'Callahan*, it is an interest in the maintenance of law and order on the military reservation. This interest is adequately served in the case of nonmilitary crimes by the apprehension of those who commit the crimes. Trial of and punishment for the commission of those crimes by courts-martial is an expansion of their jurisdiction beyond the "least possible power to the end proposed." The on-post/off-post distinction therefore has little meaning within the context of the *O'Callahan* decision.

To place conclusory importance on the on-post location of a crime rather than the nature of the crime presents logical incongruities. Will tax fraud, arguably cognizable under the "general article" of the Uniform Code of Military Justice (10 U.S.C. § 934) be held to be within the scope of military jurisdiction and is a citizen soldier to be deprived

of his fundamental constitutional rights simply because a serviceman executed his tax return in on-post housing rather than in the nearby community? In the instant case it seems anomalous to have petitioner's right to a jury trial for rape depend on where he directed his alleged victim to pull her car off the road.

Recent decisions of the United States Court of Military Appeals point out the arbitrary nature of jurisdiction based on an on-post/off-post dichotomy. In *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969), a civilian taxi driver was assaulted on-post, forced to drive off-post, and there robbed. Military jurisdiction was upheld as the assault was an element of the robbery. However, in *United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969), an automobile was stolen off-post and driven on-post and no sufficient service connection was found. *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969), involved both on-post and off-post sodomy. While the former was found to be triable by court-martial, the latter was not. In *United States v. Williams*, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969), the accused had passed bad checks at an on-post post exchange and an off-post grocery store. All checks were written on an off-post bank. The court found service connection in only the checks passed on-post.

It is submitted that the two factual differences between the instant case and *O'Callahan* are not sufficient to give the crimes of rape and kidnapping an immediate adverse impact upon the ability of the military to perform its mission. Certainly the facts of this case fall without the ambit of the "least possible power adequate to the end proposed" concept of the *O'Callahan* decision. The constitutional rights of the citizen-soldier sought to be protected are too fundamental to allow the phrase "service-connected" to be broadly construed to support the extensive exercise of military jurisdiction. There must be some strong factor that makes the exercise of those rights totally incompatible with the operation of an effective military

organization. There can be no justification for granting wider military jurisdiction than is justifiably required by the special necessities of the military. See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (concurring opinion of Mr. Justice Murphy); *cf. United States v. Robel*, 389 U.S. 258 (1967); Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

It is implicit in *O'Callahan* that purely military crimes (*i.e.*, those offenses involving a level of conduct required only of servicemen having an immediate adverse impact on the ability of the military to perform its mission) should be subject to military jurisdiction, but military jurisdiction must also be limited to purely military offenses when crimes have been committed in time of peace and within the territorial limits of the United States. This interpretation is not without historical support (see Duke and Vogel, *supra;* Brief for Petitioner; *O'Callahan v. Parker, supra*) or decisional authority. See *Ex Parte Mason*, 105 U.S. 696 (1882). Congress itself implicitly recognized the distinction between military and nonmilitary offenses when it enacted the Punitive Articles of the Uniform Code of Military Justice. 10 U.S.C. § 877 *et seq.* While that statute defines crimes known to the common law as murder, manslaughter and rape (10 U.S.C. §§ 918, 919 and 920), it also defines such crimes as desertion, absence without leave and missing movement which are totally unknown to the common law or other criminal statutes. 10 U.S.C. §§ 885, 886 and 887. In addition, it defines crimes such as assaulting a superior commissioned officer and being drunk on duty, 10 U.S.C. §§ 890 and 912. While these crimes have elements similar to common law or statutory crimes, they have an additional element giving them peculiar military significance and are therefore separately defined. The last two categories of crimes are clearly military in nature and readily identifiable. It is submitted that they are the only crimes that by their nature have an immediate adverse impact upon the ability of the military to perform its mission. Only crimes of this

nature are proper subjects for the exercise of military jurisdiction.

In conclusion, the crimes of which petitioner was convicted do not involve a level of conduct required only of servicemen and have no greater impact on the ability of the military to perform its function than O'Callahan's crimes. Petitioner's alleged crimes were not "service-connected" within the meaning of *O'Callahan*. Consequently, the court-martial convened by Court-Martial Appointing Order Number 23, Headquarters United States Army Training Center, Infantry, Fort Dix, New Jersey, had no jurisdiction to try petitioner. It follows *a fortiori* that their findings were void and petitioner's conviction was a nullity.

II. O'CALLAHAN v. PARKER SHOULD BE GIVEN FULL RETROACTIVE EFFECT

Petitioner was tried and convicted by general court-martial on December 19, 1961 (R. 19). The United States Court of Military Appeals denied petitioner's petition for review on September 24, 1963 (R. 27). On the latter date petitioner's conviction was no longer subject to direct review. James O'Callahan was convicted by general court-martial in 1956 and that conviction became final on March 1, 1957. Brief for Petitioner at 6; *O'Callahan v. Parker*, 395 U.S. 258 (1969). This Court handed down its decision in the *O'Callahan* case on June 2, 1969. It is submitted that *O'Callahan* should be given full retroactive effect so as to apply to petitioner's conviction even though that conviction had become final some six years prior to this Court's decision in *O'Callahan*.

The *O'Callahan* decision itself involved retroactive application of the principles enunciated. *O'Callahan* involved a habeas corpus petition, not an appeal; the original judgment against O'Callahan had become final some nine years before the collateral attack was begun. In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court recognized that *Gideon v. Wainwright*, 372 U.S. 335 (1963), a habeas corpus case like *O'Callahan*, was of necessity given retro-

supra. If there has been a significant effect on the integrity of that process the decision involved must be applied retroactively. See *Roberts v. Russell*, 392 U.S. 293 (1968); *McConnell v. Rhay*, 393 U.S. 2 (1968); *Berger v. California*, 393 U.S. 314 (1969). In *O'Callahan* the proscribed practice is the trial of a serviceman by a military tribunal which has no jurisdiction over the subject matter involved. It is well established that jurisdiction over the subject matter can neither be waived nor conferred by the consent of an accused. It is also well settled that the judgment of a court without jurisdiction is an absolute nullity. To give the proceedings of a tribunal any validity it must be competent to pass upon the subject matter of the suit. *Cf. Pennoyer v. Neff*, 95 U.S. 714 (1878). *O'Callahan*, therefore, involves much more than just a new and more expansive interpretation of the Bill of Rights. Rather, it goes to the very heart of the court-martial process—jurisdiction over the particular offense. The integrity of the fact-finding process by which petitioner was tried and sentenced is no less impugned by his conviction for an offense that the military had no power to try and punish him for than for an offense he did not commit. "In both situations the defect in the conviction, unlike that involved when illegally seized evidence is admitted or even when an improperly procured confession is received, goes to the very center of the legal justification for the punishment imposed." *Meadows v. United States*, 420 F.2d 795 (9th Cir. 1969).

This Court's emphasis on the importance of the integrity of the fact-finding process "is simply one frequently articulated aspect of its concern that all convictions, past and present, shall be the product of fundamentally fair proceedings." *United States v. Miller*, *supra* at 1103. Its concern that the proceedings be fundamentally fair is not restricted to its interest in protecting against the risk of convicting the innocent. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court refused to conclude that the exclusion of jurors opposed to capital punishment substantially increases the risk of conviction. Yet this Court held that

ion standards in question "necessarily under-
the jury selection standards y integrity of the . . . process' that decided
mined 'the very integrity of fate . . . ." (391 U.S. at 523 n. 22) and gave
the petitioner's fate . . . ." (3n decision full retroactive application.
the Witherspoon decision fu bse of the *O'Callahan* rule is to correct an

As the purpose of the Cfact affects the very integrity of the fact-
abuse that in fact affects a purpose well served by retroactive appli-
finding process, a purpose *han* must be given full retroactive effect.
cation, *O'Callahan* must b reliance factor nor the impact of a retro-
Neither a strong reliance on the administration of justice will avoid
active holding on the adication in these circumstances. See *Wither-*
retroactive application in t, *supra*. The factors of the extent of
spoon v. Illinois, supra. sequent burden on the administration of
reliance and consequent to be considered when the purpose of the
justice are only to be con on does not clearly favor either retroactiv-
decision in question does ty. See *Roberts v. Russell, supra; Desist*
ity or prospectivity. See *supra*. Nevertheless, it should be noted
v. United States, supra. nanding prospective application of a new
that the cases demanding lved a much greater reliance factor than
rule generally involved a *Mapp* overruled *Wolf v. Colorado*, 338
does *O'Callahan*. *Mapp* n which numerous state authorities had
U.S. 25 (1949), on whi n *Tehan, Johnson* and *Stovall* this Court
relied. Similarly, in *Tel* ict that law enforcement officials had
emphasized the fact th ruled by the new decisions. By contrast,
relied on cases overrulec drastic overruling or reversal of a prior
O'Callahan is not a dras irt; *O'Callahan* is a case of first impres-
decision of this Court; at for many years courts-martial have
sion. It is true that f objection exercised jurisdiction over
apparently without ob itted by servicemen. Acquiescence is
civil offenses committe alent to approval and the fact remains
not, however, equivale this Court had never decided the basic
that until *O'Callahan* t gh to say that Congress has expressly
issue. It is not enoug se of the jurisdiction in question. In
authorized the exercis a, this Court declared unconstitutional
Toth v. Quarles, supra Congress which expressly authorized
a statute enacted by (y jurisdiction which the court-mar-
the exercise of the ve attempted to invoke. Yes, as pre-
tial had in that case did not hesitate to give the
viously noted, this Court

Toth decision retroactive effect. Moreover, the result in *O'Callahan* cannot be said to be completely unexpected. This Court has often made reference to the fact that the jurisdiction of military tribunals is to be strictly construed. See, *e.g.*, *Toth v. Quarles*, *supra*; *Lee v. Madigan*, 358 U.S. 228 (1959).[3]

O'Callahan is in other ways a strong case for retroactivity. *Linkletter v. Walker*, *supra*, refused to give retroactive effect to *Mapp v. Ohio*, *supra*, primarily because the purpose of *Mapp* was to deter police officials from making unreasonable searches, a purpose not served by applying the rule retroactively. *Johnson v. New Jersey*, *supra*, refused to give retroactive effect to the self-incrimination rules of *Escobedo v. Illinois*, *supra*, and *Miranda v. Arizona*, *supra*, in large part because habeas corpus would still be available to test the involuntariness of any self-incriminating statement. *Stovall v. Denno*, *supra*, refused to give retroactive effect to cases which proscribe the use of identification evidence in certain circumstances, primarily because the purpose of the rule was to deter future improper actions of law enforcement authorities. See also *Halliday v. United States*, 394 U.S. 831 (1969). *O'Callahan*, which goes to the very heart of a fair proceeding, stands in sharp contrast to all of these cases.

Prior to *Linkletter*, this Court had always, without discussion, applied new constitutional rules to cases finalized before the promulgation of the new rule. See, *e.g.*, *Eskridge v. Washington State Prison Board*, 357 U.S. 214 (1958). At common law there was no authority for the proposition that judicial decisions only applied in the future. Absent

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[3]In 1960 a now often-quoted article was published concluding that the drafters of the Constitution never intended courts-martial to displace the civilian courts as the instrument for trying offenses having no special relationship to the enforcement of military discipline. Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

special circumstances, judicial decisions affecting constitutionally guaranteed rights should be retroactive. Consequently, *O'Callahan* should be given full retroactive effect so as to apply to petitioner's conviction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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